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No. 79-1252 and 79-1502

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.,

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

KERN COUNTY WATER AGENCY, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-62)[1] is reported at 610 F. 2d 581. The opinion of the district court (Pet. App. 63-129) is reported at 400 F. Supp. 610.

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[1]All appendix references in this brief refer to the separately bound appendix filed by Kern County Water Agency *et al.* in No. 79-1502.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1979. A petition for rehearing filed by the plaintiffs was denied on January 17, 1980. The petition in No. 79-1252 was filed on February 13, 1980. The petition in No. 79-1502 was filed on March 17, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a private party may bring an action seeking civil enforcement of Section 10 of the Rivers and Harbors Act of 1899.

2. Whether Section 10 of the Rivers and Harbors Act applies to a state reclamation project that diverts water from a navigable channel where the diversion diminishes the navigable capacity of the channel or where the diversion alters or modifies the course, location, condition, or capacity of the channel.

STATEMENT

1. The California Water Project (CWP) was constructed primarily for the purpose of transporting water from the northern portions of California, where precipitation is comparatively abundant, to the more arid southern half, where most of the State's population and irrigable lands are located. The CWP consists of a series of water storage and transportation works and associated facilities. Among other things, the CWP stores runoff behind dams in the Sacramento River watershed. As those waters are needed, they are released and flow down the Sacramento River to the Delta, a low-lying area of islands and interconnecting channels at the confluence of the Sacramento and San Joaquin Rivers. There, a portion of the released water is pumped out for transportation to the southern regions of the State (Pet. App. 8-9).

The CWP consists of both federal and state components. The federal component is known as the Central Valley Project[2] and is administered by the Secretary of the Interior through the Bureau of Reclamation.[3] The Tracy Pumping Plant, an essential component of the Central Valley Project, lifts waters from the Delta to the northern terminus of the Delta-Mendota Canal, which conveys the waters southwards (Pet. App. 9). The Tracy Pumping Plant began operations in 1951 (Pet. App. 69).

The state component of the CWP is known as the State Water Project (SWP). The SWP includes the Delta Pumping Plant, which pumps water from the Delta for transportation through the California Aqueduct to southern portions of the State. The Delta Pumping Plant commenced operations in 1967 (Pet. App. 9-10, 70).

An additional component of the CWP is in the planning stage. The Peripheral Canal, if constructed, would convey waters taken directly from the Sacramento River around the Delta to a point near the intakes of the two pumping plants. The Peripheral Canal would largely eliminate the diminution in water quality that now occurs when the higher quality waters of the Sacramento River commingle with the waters of the Delta (Pet. App. 71). As planned, the Peripheral Canal would, among other things, result in the closure or modification of a number of rivers and sloughs in the Delta (Pet. App. 92). To date, neither

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[2]The essential operation and features of the Central Valley Project were described by this Court in *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 279-287 (1958); and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950).

[3]The Bureau of Reclamation was recently renamed the "Water and Power Resources Service," but the term "Bureau of Reclamation" will be used in this brief since that is the term used in the opinions below.

Congress nor the California legislature has authorized construction of the Peripheral Canal.

2. Plaintiffs, two environmental organizations[4] and two individuals, initiated this action against federal and state defendants in 1971 in the United States District Court for the Northern District of California. The complaint alleged that present and proposed future diversions of waters from the Sacramento River and the Delta by means of the Tracy and Delta Pumping Plants and the Peripheral Canal have degraded, and will further degrade, water quality in the Delta and San Francisco Bay, with consequent adverse effects upon wildlife, fisheries, and recreation. Plaintiffs contended that the existing and proposed further diversions violate, or will violate, various statutes including Sections 9 and 10 of the Rivers and Harbors Act of 1899, [hereinafter "the 1899 Act"], 33 U.S.C. 401 and 403, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Plaintiffs requested the court to enter a judgment declaring that the defendants have not complied with applicable statutes and to enjoin further operation or construction of the water diversion facilities until such time as the defendants comply with the law.

In response to the complaint, the federal defendants contended that the operations of the Tracy Pumping Plant did not violate Sections 9 and 10 of the 1899 Act and NEPA. With regard to the Peripheral Canal, the federal defendants argued that any ruling on this issue would be premature because the Secretary of the Interior had not yet submitted any feasibility report concerning

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[4]The court of appeals subsequently held that one of the environmental organizations lacked standing and directed the district court to dismiss it from this action (Pet. App. 25-26).

the project to Congress and that any such feasibility report would be accompanied by an adequate environmental impact statement (EIS). In its answer, the State of California denied that the operation of its facilities violated any laws. Subsequently, the district court entered orders permitting the Tulare Lake Basin Water Storage District, the Kern County Water Agency, the Metropolitan Water District of Southern California, and the Santa Clara Valley Water District (the Water Agency petitioners) to intervene as defendants.

The district court entered its opinion on July 28, 1975 (Pet. App. 63-129). First, the district court held that private persons are entitled to bring actions seeking to enforce Sections 9 and 10 of the 1899 Act (*id.* at 72-80). Second, the court ruled that the Peripheral Canal, if constructed, will require permits from the Secretary of the Army pursuant to Sections 9 and 10 of the 1899 Act (*id.* at 81-83, 91-93). Third, the court, finding that the pumping of the Tracy and Delta Pumping Plants resulted in a reduction of the navigable capacity of certain waters, ruled that the federal and state defendants had violated Section 10 of t' e 1899 Act by failing to obtain permits for such diversions from the Secretary of the Army (*id.* at 83-104). Finally, the court held that any Section 9 or 10 permit issued by the Secretary of the Army must be preceded by an adequate EIS (*id.* at 108-121). Plaintiffs' remaining causes of action were dismissed (*id.* at 129).

An order granting injunctive relief was entered on December 18, 1975. The order directed the federal and state defendants to obtain Section 10 authorization to operate the Tracy and Delta Pumping Plants and required

that any such permit be preceded by an EIS (Pet. App. 6).[5] The court further directed that no work on the Peripheral Canal may be commenced until Section 9 and 10 permits are obtained and that any such permits must be preceded by an EIS (*ibid.*). All of the defendants appealed from this order.[6]

3. The court of appeals (Pet. App. 5-62) affirmed in part and reversed in part. First, the court of appeals agreed (*id.* at 22) that "private parties who suffer special injuries because of unauthorized activities affecting the navigable capacity of our Nation's waters may sue to enforce the permit requirements of [S]ection 10." Second, the court of appeals affirmed the ultimate holding of the district court that Section 10 applied to the pumping operations at issue, but it did not base the holding on the district court's findings that the operations produced obstructions to the navigable capacity of certain rivers, in violation of the first and third clauses of Section 10. Rather, it concluded that the finding that the pumping operations altered the condition of the rivers was sufficient to bring those operations within the third clause of Section 10, which makes it unlawful, without authorization from the Secretary of the Army, "to excavate or fill, or in any manner to alter or modify the

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[5]We are advised by the Sacramento District of the Corps of Engineers that, although the State takes the position that Section 10 does not apply to its Delta Pumping Plant, the State, as a precautionary measure, filed an application for a Section 10 permit on October 21, 1975. The Corps has been processing the application and working with the State on the requisite EIS since that date. If the permit is to be granted, it will be granted no later than December 1, 1980, according to the present schedule.

[6]None of the appellants attacked the district court's holdings with respect to the Peripheral Canal.

course, location, condition, or capacity of * * * the channel of any navigable water of the United States * * *." The court of appeals reversed the district court with respect to the federal Tracy pumping facilities (Pet. App. 39-49), finding that those works had been affirmatively authorized by Congress and were thus exempt from the requirements of Section 10. The court of appeals agreed (*id.* at 50-52), however, that a Section 10 permit issued for a particular component of the State facilities did not authorize the facilities in their entirety and that an FPC license for portions of the California Water Project did not exempt those facilities from Section 10 requirements. Finally, noting that current regulations of the Army Corps of Engineers exempted structures completed before December 18, 1968, from the permit requirement where the works do not interfere with navigation, the court (Pet. App. 53-54) remanded the case to the district court for a determination whether the State's facilities are exempt under the regulation and, if so, whether such regulatory exemptions are permissible under the 1899 Act.

DISCUSSION

1. The Water Agency petitioners correctly point out (Kern Pet. 20-24) that the circuits are divided on the question whether the Rivers and Harbors Act of 1899 may be enforced by private parties.[7] We agree with

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[7]As the Water Agency petitioners note (Kern Pet. 22-23), the court of appeals suggested (Pet. App. 11 n. 6) that the Third Circuit decision in *Red Star Towing & Transportation Co.* v. *Dept. of Transportation of New Jersey*, 423 F. 2d 104 (3d Cir. 1970), was distinguishable because it rested on the State's Eleventh Amendment immunity against suits in admiralty. In a recent decision, *National Sea Clammers Ass'n* v. *City of New York*, No. 79-1360 (Feb. 5, 1980), the Third Circuit has, however, expressly ruled (slip op. 21) that enforcement of Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 (the Refuse Act), "is limited to actions by the United

petitioners that the court of appeals erred in concluding that petitioners enjoyed an implied right of action under the 1899 Act; and we join them in urging this Court to review that question, in light of the number of circuits in which cases posing this issue have now arisen, and the potential for interference with the administration of the Act by the Army Corps of Engineers (the body to which the Secretary of the Army has delegated his permit-granting authority).

In finding that a private right of action could be implied from the 1899 Act, the court of appeals misapplied factors this Court has specified as relevant to that determination (*Cort* v. *Ash*, 422 U.S. 66, 78 (1975)). Noting that Section 10 of the Rivers and Harbors Appropriations Act of 1890, ch. 907, 26 Stat. 426, 454, was enacted in response to *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1888), a case in which private parties were denied a federal court injunction to enjoin construction of a bridge over a navigable water because such obstructions were not prohibited by federal law, the court of appeals concluded that private parties suffering injury from such obstructions must have been intended beneficiaries under the 1890 Act and its successor, the 1899 Act. The disturbing aspect of *Willamette*, however, was the clear implication that, because the Court recognized no general "common law of the United States [prohibiting] obstructions and nuisances in navigable rivers" (125 U.S. at 8), even federal authorities could not prevent or compel the removal of obstacles to navigation. See 125 U.S. at 9. As this Court later observed, the 1899

States Attorneys," and it characterized *Red Star Towing* as a decision that rejects the contention that a private remedy should be implied whenever a United States attorney is involved as counsel for federal defendants.

Act asserted the "sovereign power of the United States" and the government is "a principal beneficiary of the Act, if not the principal beneficiary." *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201 (1967). Although the debate on the 1890 Act indicates that Congress was aware that individual groups of citizens had on rare occasions attempted, usually without success, to enjoin obstructions, and were unable to obtain the aid of federal authorities because those authorities had no law under which to proceed (21 Cong. Rec. 8603 (1890) (remarks of Senator Vest)), there is no suggestion that either the 1890 or the 1899 Act was focussed on protecting the rights of a class of citizens as is, for example, the Voting Rights Act of 1965, 42 U.S.C. 1973. Cf. *Allen* v. *State Board of Elections*, 393 U.S. 544, 557 (1969).

Examining the legislative history of the 1899 Act, the court of appeals found no reflection of "congressional intent either to afford a private remedy or to deny one" (Pet. App. 15), and it discounted the express language of the Act's enforcement provisions, including Section 17, 33 U.S.C. 413, which provides that "the Department of Justice shall conduct *the* legal proceedings necessary to enforce" the prohibitory provisions of the Act (emphasis added). The court's treatment of that language conflicts with this Court's approach in *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 413-419 (1975); *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). See also *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979).

The third factor identified by this Court in *Cort* v. *Ash*, *supra*—whether implying a private right of action is consistent with the underlying legislative scheme—also weighs against implying such a remedy. As the Second

Circuit has accurately observed with respect to enforcing the Act's prohibitions of discharges, the "clear congressional purpose" to concentrate enforcement in the Department of Justice could be subverted if a "careful federal decision not to seek an injunction because of some general policy or in view of [some] other means of ending or alleviating the discharge, could be upset by any individual who thought he understood better the needs of the public." *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F. 2d 81, 89 (1972). That in some cases the federal government might ultimately agree with private plaintiffs in such suits that some activity affected a navigable water in such way as to require abatement or monitoring under the 1899 Act does not refute this proposition.

The fourth factor, whether the cause of action is one which has traditionally been relegated to state law, may cut both ways. But, on the basis of the first two factors alone, properly applied, the court of appeals should have concluded that no private right of action may be implied under the 1899 Act. *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 576.

2. The court of appeals held (Pet. App. 27-28, 39) that, because it was shown that the operation of the Delta Pumping Plant lowered the water level of a navigable stream, Section 10 of the 1899 Act requires authorization by the Corps of Engineers regardless of whether there is any additional showing that this alteration of condition amounted to an obstruction of navigable capacity. Petitioners (State Pet. 11-14; Kern Pet. 25-31) assert that this construction of Section 10 of the 1899 Act is overbroad.

Petitioners could be correct in contending that Section 10 does not require permits from the Corps of Engineers as to every alteration in the condition of a navigable stream, regardless of effects on navigable capacity.[8] Nevertheless, on the present record, this case is not an appropriate vehicle for reviewing that question. The district court found that both the State's Delta Pumping Plant and the federal Tracy Pumping Plant obstructed navigable capacity through lowering water levels and producing net flow reversals in navigable waters and thus came within the first and third clauses of Section 10 (Pet. App. 92-93). Although the court of appeals "decline[d] to adopt the District Court's approach" (Pet. App. 27), it did not reverse the district court's findings with respect to effects on navigable capacity. Hence, the court of appeals'

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[8]The Corps of Engineers does not claim such broad jurisdiction for its permit program. Where, as in the present case, the effects on navigable waters at issue are produced by structures or work not themselves located within a navigable water of the United States, a Section 10 permit is required only if the structures or work "affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody." 33 C.F.R. 322.3(a)(1) (1979).

decision with respect to Section 10 coverage may well be sustainable on a ground other than its broad construction of that provision. Clearly, the fact-bound question whether the evidence supports the district court's findings respecting obstruction of navigable capacity is not appropriate for review by this Court.

Other contentions made by petitioners in attacking the court of appeals' conclusion that Section 10 permit requirements apply to the Delta pumping operation do not respond only to the broad construction given Section 10 by the court of appeals, but would, if upheld, take certain State operations out of the ambit of Section 10, even where an obstruction of navigable capacity was shown. In particular, petitioners suggest (State Pet. 8; Kern Pet. 27-29) that an actual interference with navigation must be shown before a work or structure can be found to come within the third clause of Section 10. They also argue that Section 10 does not apply to diversions of water that are part of a state water allocation scheme (State Pet. 14-22) but that, if it does apply, a special limiting construction is required (Kern Pet. 31-36). The court of appeals' rejection of these contentions is correct and does not conflict with decisions of this Court or of any other court of appeals, so review of these questions is equally unwarranted.

a. Nothing in the language of Section 10 suggests that actual impairments of navigation must be shown before a permit may be required.[9] The plain language of Clause 3

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[9]The State petitioners incorrectly suggest (State Pet. 10-11) that the federal respondents agreed in the court below that this is the proper test, at least where state water allocations are concerned, and they

of Section 10 makes the permit requirement applicable to any alteration of the "capacity" of a navigable stream, and the "broader" prohibition of obstructions to navigable capacity in the first clause reinforces the prohibition against unauthorized alterations of navigable capacity in Clause 3. *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 486 (1960).[10] Although, as petitioners point out

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quote out of context language from the federal respondents' reply brief. The complete passage from the reply brief states (Br. 6-7 n.3):

> Thus, we disagree with California and the intervenors to the extent that they suggest that Section 10 comes into effect only in cases involving obstructions to actual present traffic on navigable waters. The proper focus of inquiry is whether the activity in question affects navigable capacity rather than its impact on actual navigation. *Weiszmann* v. *Dist. Eng., U.S. Army Corps of Eng.*, 526 F. 2d 1305 (C.A. 5, 1976); *United States* v. *Diamond*, 512 F. 2d 157, 160 (C.A. 5, 1975), cert. denied, 423 U.S. 923; *United States* v. *Joseph G. Morett, Inc.*, 478 F. 2d 428-429 (C.A. 5, 1973); cf. *United States* v. *Sunset Cove, Inc.*, 514 F. 2d 1089 (C.A. 9, 1975). Applicable Corps of Engineers' regulations require a Corps' permit for structures or work physically outside of navigable waters" * * * if these structures or work affect the course, location, or condition of the waterbody in such a manner as to significantly impact on the navigable capacity of the waterbody." 33 C.F.R. sec. 209.120(e)(i).
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> We do not mean to imply, however, that by promulgating these regulations the Secretary of the Army intends to take over traditional state administration of appropriative water rights—a task far beyond both Congress' intent in enacting Section 10 and the Corps of Engineers' present capabilities. Perhaps needless to state, the delicate balance between federal control over navigable waters and state authority over traditional appropriate water rights may well be upset should private rights of action to enforce Section 10 be allowed.

[10]The Water Agency petitioners' argument (Kern Pet. 27) that the use of the term "channel" in the third clause of Section 10 makes that clause applicable only to alterations in "the physical bed of a stream, bay, or sound" as opposed to alterations in the "waters which it encloses" is without merit. If "channel" as used in that clause meant

(State Pet. 26; Kern Pet. 29), the record showed such an interference resulting from the water diversion concerned in *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929) and *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), this Court nowhere indicated in those decisions that interference with navigation was the only test. Similarly, the Water Agency petitioners are incorrect in contending (Kern Pet. 30-31) that a decision affirmed by the Third Circuit, *United States* v. *Bigan*, 170 F. Supp. 219 (W.D. Pa. 1959), aff'd, 274 F. 2d 729 (3d Cir. 1960), conflicts with the decision of the court below on this point. Both the district court and the court of appeals in *Bigan* held only that where the federal government invokes its authority, independent of statute, to enjoin obstructions of navigation or direct interferences with the flow of commerce, it must show an actual interference with navigation. 170 F. Supp. at 225-226; 274 F. 2d at 732-733.

b. There is no merit to petitioners' contentions that Section 10 does not apply to water diversions by facilities owned and operated by a state—or that if Section 10 does apply to such diversions, a special limiting construction is required. The argument is effectively refuted by *Sanitary District of Chicago* v. *United States*, *supra*, in which this Court held that a corporation organized under an Illinois statute to provide for public sanitation in a portion of Northern Illinois (266 U.S. at 424) was prohibited by Section 10 of the 1899 Act from making unauthorized

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nothing more than the physical bed of a body of water, the reference in the clause to a "course" would make little sense. Waters, not streambeds, are properly described as having a course. In any event, *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), the decision from which these petitioners derive this definition, identifies the "middle of the main channel" of a navigable stream with "the thread of the navigable current." 258 U.S. at 593.

diversions from Lake Michigan for public sanitation purposes. The Court nowhere suggested that Section 10 had only limited application to such diversions for public purposes. Indeed, in *Wisconsin* v. *Illinois*, *supra*, a subsequent case concerned with the same diversions, the Court noted that the Secretary of War, charged with administering Section 10, was obligated to use his permit-granting authority so as "to maintain the navigable capacity of Lake Michigan," and could not grant a permit simply to aid the public body in providing for sewage disposal (278 U.S. at 417-418).

Petitioners' position is not advanced by their reliance (State Pet. 14-19; Kern Pet. 31-36) on other statutes affecting state water allocation, in which Congress has expressed an intent not to interfere with state authority in such matters, or on decisions of this Court recognizing state authority over intrastate waters. Those statutory provisions reflect only the limitations of federal jurisdiction based on the statutes in which they appear and cannot serve as the basis for exemptions to the 1899 Act. Moreover, as this Court explained in *California* v. *United States*, 438 U.S. 645 (1978), a case heavily relied on by petitioners, a state's authority over its internal waters does not permit it to disturb the navigability of rivers. 438 U.S. at 662, citing *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709 (1899).[11]

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[11]The State petitioners (Pet. 22-24) advance an additional argument, not made in the court below, that Section 10 may not be enforced against a state because the first sentence of Section 12 of the 1899 Act, 33 U.S.C. 406 (Pet. App. 2-3), which deals with penalties for violations of Section 9, 10, and 11 of the Act, refers to "[e]very person and every corporation" and does not expressly include states. That sentence, however, concerns only criminal penalties. The second sentence of Section 12, which authorizes the Attorney General to seek

4. The Water Agency petitioners contend (Kern Pet. 36-37) that the Delta Pumping Plant was authorized by a Section 10 permit granted by the Corps for construction of the Clifton Court Forebay, an intake facility for the plant. The court of appeals found (Pet. App. 50-51) that the permit did not by its terms authorize the pumping operation and that the material submitted in support of permit application did not even directly refer to the pumping plant. Accordingly, it agreed with the district court that the permit for this one structure could not be considered authorization for the entire pumping plant. The conclusion is correct, and, in any event, the agreement of two courts on such a fact-bound issue does not raise a question appropriate for review in this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

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civil injunctions, contains no language arguably limiting enforcement to a specific class of violators. In addition, the remedies that the government may seek under the 1899 Act are not limited to those specified in Section 12. *Wyandotte Transportation Co.* v. *United States*, *supra*, 389 U.S. at 202-203; *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 491-492.

CONCLUSION

The petition for a writ of certiorari in No. 79-1252 should be denied. The petition in No. 79-1502 should be granted, but limited to the question whether the Rivers and Harbors Act of 1899 may be enforced by private suit.

Respectfully submitted.

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